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# Supreme Court of the United States

OCTOBER TERM, 1928.

F No. 272

THE PETITION OF W. A. MARSHALL & CO., INC., FOR A WRIT OF CERTIORARI DIRECTED TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT TO BRING BEFORE THIS COURT THE CASE OF

W. A. MARSHALL & CO., INC.,

*Libellant-Appellant,*

v.

STEAMSHIP "PRESIDENT ARTHUR," HER ENGINES, BOILERS, ETC.,

*Claimant-Appellee.*

## PETITION AND BRIEF.

GEORGE WRIGHT HINCKLEY,
*for the Petitioner.*

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# Supreme Court of the United States

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No.

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The petition of W. A. Marshall & Co., Inc., for a writ of certiorari directed to the Circuit Court of Appeals for the Second Circuit to bring before this court the case of

W. A. MARSHALL & CO., INC.,

Libellant-Appellant,

v.

Steamship "PRESIDENT ARTHUR," her engines, boilers, etc.,

Claimant-Appellee.

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## PETITION.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

Your petitioner prays for a writ of certiorari to review a final decree in admiralty by the Circuit Court of Appeals for the Second Circuit rendered on April 16, 1928 (Record p. 51) affirming a decree of the District Court for the Southern District of New York.

## Statement.

The question below was whether or not a contract for supply of bunker coal supported a maritime lien.

There is no dispute as to the facts in this case as libellant's witness alone was called.

The American Palestine Line, owner of the SS. "President Arthur" negotiated a contract with petitioner, coal suppliers, for approximately 4150 tons of coal as bunkers for that steamer. In the negotiations for the supply, it developed that owner wished longer terms of payment than petitioner usually granted (fol. 40). Accordingly petitioner insisted upon trade acceptances as a means of payment so that by discounting these it might, if it desired, be put in funds prior to the day ultimately stated for payment (fol. 40). Investigation disclosed that on account of owner's financial standing, its paper was not discountable and so acceptable indorsements were demanded. These were the sole purposes in payment by acceptances and of the indorsements thereon (fols. 51, 55).

Two contracts, dated February 18, 1925, and March 4, 1925, respectively, resulted from these negotiations. The terms of payment provided therein were as follows:

> "The buyer will pay for the said coal as follows:
>
> (1) By delivering to the seller a trade acceptance drawn by it in favor of the Seller, dated the date of delivery of the coal, due March 10, 1925, covering railroad freight of $2.79 a gross ton, which acceptance is to be endorsed by Jacob Wacht, Jacob S. Strahl and Joseph W. Gottlieb.
>
> (2) A trade acceptance drawn by the Buyer in favor of the Seller, dated on the same day, due May 8, 1925, covering the balance of the purchase price, to wit: $2.31 a gross ton, representing the coal, harbor barge freight and insurance on coal while in barges, which acceptance is also to be endorsed by the said Jacob Wacht, Jacob S. Strahl and Joseph W. Gottlieb.

The coal was delivered and the acceptances given. The first acceptance for an amount equal to the railroad freight

on the coal delivered under both contracts, was paid at maturity (fol. 48). The second acceptance, for the balance due under both contracts, was not and never has been paid (fol. 91).

The libel herein for the unpaid balance of the purchase price was filed and the "President Arthur" arrested May 11, 1925 (fol. 2). A civil action upon the unpaid acceptance but against the indorsers only, was commenced in the state court June 18, 1925, and is still pending and undetermined (fols. 22, 23, 52). Over objection, claimant offered in evidence two affidavits submitted by petitioner on a motion for summary judgment in such civil action (Claimant's Exhibits C and D, fols. 83-104) in which affidavits the indorsement of the acceptance by the individuals there sued was stated to have been "part of the consideration" for the sale of the coal (fols. 93, 102).

Both the District Court and the Circuit Court of Appeals have dismissed the libel.

The primary ground of decision of the District Court is that as the contract required payment coincidentally with the delivery of the coal by delivery of trade acceptances of the owner bearing three indorsements, fulfillment of this requirement was payment and hence no lien could arise.

The grounds of decision of the Circuit Court of Appeals, to which a dissenting opinion was written by Judge Learned Hand, may be briefly summarized as follows:

*First:* "Where parties agree to an express contract as to payment" (even though this be by notes of the original debtor) "the contract becomes extinguished by full performance" (that is by the mere giving of the notes even though they be not paid at maturity) "and so it is impossible that either party should have any claim against the other arising out of the contract" (Opinion, p. 47).

*Second:* Cash was not contracted for, but a payment other than cash was provided by the contract, hence

"• • • If the party does not choose to rely on the contract which the maritime law implies in such cases, but takes an express written contract, he must rely on the contract he makes for himself, and cannot, upon a change of circumstances, resort to the securities upon which, in the absence of any special agreement, the law presumes that he relied; and if he takes a note or bill of exchange, or any other personal engagement, for the payment of the debt, he is presumed to rely on this personal security, and to waive his lien, unless he stipulates that the liability of the vessel shall still continue."

*Phelps* v. *The Camilla*, Taney 400, Fed. Cas. No. 11,073 (Md. 1838).
(Opinion, p. 46.)

*Third:* The Merchant Marine Act of 1920, which provides that to support a lien "it shall not be necessary to allege or prove that credit was given to the vessel," provides also that nothing in that act shall prevent the furnisher of supplies from waiving his right to a lien by agreement or otherwise. The right to the lien may be displaced "by the insertion of some stipulation wholly incompatible or irreconcilable with the existence of such a right." Requiring indorsements of owner's acceptances was such a stipulation; *ergo* "the appellant relied solely upon the indorsement and not upon the maritime lien" (Opinion, pp. 46-48).

## Reasons for Granting Petition.

Your petitioner urges that the decision of the Circuit Court of Appeals should be reviewed by the court for the following reasons:

1. In view of the revived and greatly extended use of "trade acceptances" as a means of payment under the regu-

lations of the Federal Reserve Bank Board by merchants generally, and particularly by those connected with shipping, it is desirable that this court define the limitations to which they are subject when used in connection with contracts with ship owners.

2. The decision of the Circuit Court of Appeals is contrary to the decisions of this court in respect of when a note constitutes payment. In *The Emily Souder*, 17 Wall. (84 U. S.) 666, it was held that the taking of master's drafts on owners, even though by agreement and coincident with the creation of the debt, was only conditional payment and that "nothing can be payment in fact except what is in truth such." In *The Bird of Paradise*, 5 Wall. (72 U. S.) 545, the taking of an acceptance, for a portion of the freight, so provided in the charter party, was held not to be payment.

3. The decision of the Circuit Court of Appeals is contrary to the decisions of this court in respect of when the taking of a note constitutes a waiver of a maritime lien. In *The Bird of Paradise*, *supra*, this court held that a charter party that provided for payment of freight by delivery of charterer's acceptances, the one at the time of loading and maturing prior to the delivery of the cargo and the other to be delivered subsequent to the delivery of the cargo was, as to the first, a conditional payment merely and was not a waiver of the maritime lien but as to the second acceptance there was a waiver of lien *pro tanto*. Further the decision herein nullifies the Merchant Marine Acts of 1910 and of 1920 and places the material man and supplier back in the same position in which he was prior to the passage of the acts. As stated in *Piedmont Coal Co.* v. *Seaboard Fisheries Co.*, 254 U. S. 1, 11, the acts were designed to correct the doctrine of earlier cases: *The St. Jago de Cuba*, 9 Wheat. 409, and others, which held that it was for the seller to show that he had

relied on the credit of the ship and not on that of the owner. The acts not only changed this burden of proof but permitted the supplier to rely upon the credit of both ship and owner (*Piedmont Coal Co.* v. *Seaboard Fisheries Co., supra*).

4. This decision of the Circuit Court of Appeals for Second Circuit is in conflict with the decisions of the Circuit Courts of Appeals of other Circuits. In the Fifth Circuit it was held in *El Amigo*, 285 F. 868 and *Ricou* v. *Fairbanks, Morse & Co.*, 11 F. (2) 103, that the lien is not waived even when other security than that of the ship be provided. In the Eighth Circuit it was held in *Leschen & Sons Rope Co.* v. *Mayflower G. M. & R. Co.* 173 F. 855, that where a contract provided for reservation of title until the last payment be made and such payment was to be made subsequent to the delivery of the materials by buyer's 60 day note, the taking of the note was not absolute payment and did not waive the reservation of title.

WHEREFORE, your petitioner prays that this Honorable Court will be pleased to grant a writ of certiorari in this case to the Circuit Court of Appeals for the Second Circuit to bring up the case to this Honorable Court for such proceedings therein as may be just.

W. A. MARSHALL & CO., INC.,
By JOHN D. KLINE,
Vice-President.

State of New York,
County of New York, } ss.:

John D. Kline, being duly sworn, deposes and says that he is the vice-president of W. A. Marshall & Co., Inc., the petitioner herein; that he has read the foregoing petition and that the facts therein stated are true to the best of his knowledge, information and belief.

JOHN D. KLINE.

Sworn to before me
this 13th day of July, 1928.

KATE HORN, (Notarial Seal)
Notary Public,
New York County No. 338.

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I hereby certify that I have examined the foregoing petition, and that, in my opinion, the same is well founded and is entitled to the favorable consideration of this Honorable Court.

GEORGE WRIGHT HINCKLEY,
Attorney for Petitioner.

## BRIEF IN SUPPORT OF PETITION.

Application is made under Section 240 (a) of the Judicial Code for certiorari to review a final decree in admiralty rendered by the Circuit Court of Appeals for the Second Circuit on April 16, 1928, and shown on page 51 of the Record.

### POINT I.

### The holdings below as to when a note is payment are contrary to the applicable decisions of this court.

The decision below holds that where an owner by agreement promises to deliver his note coincidentally with the creation of the debt, such note is payment whether or not the same be paid at maturity.

In the case of *The Emily Souder*, 17 Wall. (84 U. S.) 666, the vessel arrived in distress at a port in Brazil. The captain was without sufficient funds to provide for the necessary repairs, supplies and expenses, but, through the consul, secured one willing to make the advances upon reasonable commission, taking the captain's drafts on owners in payment. The drafts were not paid and the vessel was libelled. Mr. Justice Field, in his opinion at page 670, states the law as follows:

> "The drafts given by the captain upon the owners of the vessel in New York were not received by the libellants in discharge and satisfaction of the sums advanced. They were received only as conditional payment. Such would be the presumption of law in the absence of any direct evidence on the point. For by the general commercial law of the world, a promise to pay, whether in the form of notes or bills,

> is not of itself the equivalent of payment: it is treated everywhere, in the absence of express agreement or local usage to the contrary, as conditional payment only. On principle, nothing can be payment in fact except what is in truth such, unless specially agreed to be taken as its equivalent."

There is "no local usage to the contrary" in New York, where the effect of the provision of a contract for payment by delivery of purchaser's acceptances has been held to be a mere extension of the time of payment, and that upon default in payment of the acceptances the seller may treat the contract as terminated and sue for the value of the goods furnished. (*Kokomo Strawboard Co.* v. *Inman, et al.*, 134 N. Y. 92, 94.)

In the case of *The Bird of Paradise*, 5 Wall. (72 U. S.) 545, the contract provided "the freight to be paid in Liverpool * * *, one fourth in cash, one fourth by acceptance of charterer at six months from the final sailing of the vessel and the remainder by like bill, at three months from delivery, etc." The cash was paid on loading and the first of the two acceptances was given but not paid. Mr. Justice Clifford, in giving the decision of this court, referring to the acceptance given but unpaid, stated at page 561:

> "Payment of that instalment of the freight is not proved, * * * Ship-owner under the circumstances has a right to stand upon the original contract and to seek his remedy to that extent of his claim in the form to which it originally belonged as fully as if the acceptance had never been given."

The error of the Circuit Court of Appeals was the same as that of the District Court. It applied the doctrine that taking the note of a *third party* at the time of the creation of a debt is presumed to be payment (*Atlas S. S. Co.* v. *Colombian Land Co.*, 102 F. 358, 360 [C. C. A. 2]; *N. Y. &*

*Cuba S. S. Co.* v. *Texas Co.*, 282 F. 221, 223 [C. C. A. 2]), whereas in the instant case petitioner took the note—the acceptance—of the original debtor. The owner remained primarily liable notwithstanding the indorsements. The doctrine of novation does not apply.

## POINT II.

### The holdings below as to when the taking of a note constitutes a waiver of maritime lien are contrary to the applicable decisions of this court.

In *The Bird of Paradise*, *supra*, the question was not only whether the taking of charterer's acceptances for portions of the freight, so provided in the charter party, constituted payment of the freight but also whether an agreement so to take such acceptances operated as a waiver of the lien. Mr. Justice Clifford held the lien for freight is maritime and may be enforced by a proceeding *in rem;* presumption is in favor of the lien, but it may be displaced by some stipulation incompatible with such a right. In respect of the provision for the first acceptance for one fourth of the freight, maturing prior to time of delivery of the cargo, he found no incompatibility or irreconcilability. He said at page 561, "there is no evidence in the record tending to show that the lien for that instalment of the freight was ever waived." As to that portion of the freight covered by the acceptance which was not even to be given until notice had been received in Liverpool of right delivery of the cargo in San Francisco, he held that there the stipulation was incompatible with the retention of the lien and that the lien was waived *pro tanto*. This result is clearly contrary to the observations of the Circuit Court of Appeals in respect of this case (Opinion, p. 47).

## POINT III.

### The holdings below nullify the Merchant Marine Acts of 1910 and 1920.

Prior to the Maritime Lien Act of 1910, there was a very considerable confusion in the law relating to a supplier's lien on vessels. Difficulties and anomalies arose through early cases. The one which has a bearing on the question which is here considered is *The St. Jago de Cuba*, 9 Wheat. (22 U. S.) 409, decided in 1824. The doctrine of that case was that when the owner of a vessel contracts in person for necessaries or is present at the port where these are ordered, it is presumed that the supplier did not intend to rely upon the credit of the vessel. In *Phelps v. The Camilla*, Taney 400; Fed. Cas. 11073 (Md. 1838), which is cited and quoted from by the Circuit Court of Appeals as controlling the instant case (Opinion, p. 46), Justice Taney in denying the lien expressly followed the doctrine of *The St. Jago de Cuba* case and held there was no difference in principle between a purchase by the owner and one by his agent residing at the place of purchase. He held also that libellant sold the material to the agent on his personal credit and that he in turn supplied the vessel, adding *obiter* that the taking of a note would have released the lien anyway.

Many and varying evils arose from the doctrines of these earlier cases and the presumption as to whom or to what the credit was extended. Finally, in 1910, Congress passed the Merchant Marine Act which this Court in *Piedmont Coal Co. v. Seaboard Fisheries Co.*, 254 U. S. 1, 11, stated was for the express purpose of doing away with the doctrine of *The St. Jago de Cuba* case. No longer is there a presumption that under any circumstances the supplier did not rely upon the credit of the vessel. The burden of proving that supplier did not rely upon the credit of the vessel is now upon the claimant.

> "* * * *the lien is presumed* on proof of due delivery on request of lawful supplies, *until such presumption is destroyed by affirmative proof of agreement that the promising party was to be exclusively liable* for payment." (Italics ours.)

Judge Hough in *The Bronx*, 216 F. 809, 810 (C. C. A. 2).

> "A vessel may be made liable *in rem* for supplies, although the owner can be made liable therefore *in personam*; *since the dealer may rely upon the credit of both.*" (Italics ours.)
>
> *Piedmont Coal Co. v. Seaboard Fisheries Co.*, 254 U. S. 1, 10.

In the instant case there was no "affirmative proof of agreement that the promising party was to be *exclusively liable for payment.*" (Italics ours.) The court below held that although there was no specific agreement to waive the lien and no estoppel but merely because the supplier had by agreement some security beyond the vessel he did not rely upon the credit of the vessel as well. This nullifies the Merchant Marine Act by depriving the supplier of the lien which that act expressly gives him.

## POINT IV.

### The decision of the Circuit Court of Appeals for the Second Circuit is in conflict with decisions of the Circuit Courts of Appeals for the Fifth and Eighth Circuits.

The Circuit Court of Appeals for the Fifth Circuit has twice held that the taking by agreement of other security than the lien on the vessel does not constitute a waiver of the lien. In *The El Amigo*, 285 F. 868 (1923), one Miller

had given the City of Houston a bond with surety conditioned "that payment be made of all dockage and other charges accruing in favor of the city from ships operated by Miller." The court then said, at pages 870-871:

> "The terms of the bond do not indicate that the acceptance of it was intended to have the effect of waiving, releasing, or discharging any lien the city might acquire. There was no evidence that the city consented to give up its lien, or that the bond was accepted in lieu of claims which might arise in the city's favor for wharfage, etc. That being so, the city's acceptance of the bond did not deprive it of its lien."

Again in *Ricou* v. *Fairbanks, Morse & Co.*, 11 F. (2) 103 (1926), decided also by this same court, an engine had been supplied the vessel under a contract containing a reservations of title. On holding the exceptions to the libel to be without merit, the court said, at pages 104-105:

> "• • • under the terms of the above quoted statute, one who furnishes repairs, supplies, or other necessaries to a vessel upon the order of its owner has a maritime lien on such vessel, whether he does or does not allege or prove that he did so on the credit or faith of the vessel."
>
> "• • • the libel showed that the equipment covered by the written contract was furnished by the appellee to the boat on the order of its owner. The retention by contract of the title to such equipment as security for the purchase price was not inconsistent with the existence of the lien given by the statute, and did not prevent the appellee from asserting that lien."

In both of these cases there was no mention of retention of the security of the vessel and other security was provided for by agreement made prior to incurring the debt. The decisions in the Fifth and Second Circuits cannot

be harmonized or differentiated and are clearly in conflict with one another.

*Leschen Rope Co.* v. *Mayflower G. M. & R. Co.*, 173 F. 855 (C. C. A. 8) did not involve a maritime lien but a reservation of title. The contract provided for delivery of certain materials with certain payments therefor, the final amount "to be paid by your note at sixty days, • • • not later than sixty days from the arrival of the last shipment." Title was to remain in the seller and it might retake possession "in default of the last payment being made." The final note was given but not paid. Seller sought to replevy the materials. The court held the debt "remained unpaid, and will remain unpaid, until the note is paid." It said further, at page 858:

> "where the extinguishment of a debt has the effect to strike down a lien or a title securing its payment, the presumption that it is not discharged by the acceptance of the note of the debtor in payment of it is strengthened, because in such a case the discharge of a lien is more unusual and unreasonable. 'The Kimball,' 3 Wall. 37, 45, 18 L. Ed. 50; Sweet & Carpenter v. James, 2 R. I. 270, 294, 297; 'The Bird of Paradise,' 5 Wall. 545, 18 L. Ed. 662."

Thus, the holding of the court below that "where parties agree to an express contract as to payment, the contract becomes extinguished by full performance and so it is impossible that either party should have any claim against the other arising out of the contract" is in direct conflict with this decision of the Circuit Court of Appeals for the Eighth Circuit. There is no distinction between the security of title reserved, as in the case just cited, and a maritime lien in the respect that neither can survive payment.

## Conclusion.

It is respectfully submitted that the writ of certiorari should be granted as prayed for.

GEORGE WRIGHT HINCKLEY,
For Petitioner.